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Motion

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 BETSY FEIST, Individually, and
4 on behalf of all others
5 similarly situated,

6 Plaintiff,

7 v.

11 Civ. 5436 (JGK)

8 RCN Corporation and PAXFIRE,
9 INC.,

10 Defendants.

-----x

11 New York, N.Y.
12 September 18, 2012
13 10:36 a.m.

14 Before:

15 HON. JOHN G. KOELTL,

16 District Judge

17 APPEARANCES

18 MILBERG, LLP

Attorneys for Plaintiff

19 BY: MELISSA RYAN CLARK

PETER E. SEIDMAN

20 ADAM J. BOBKIN

SANFORD DUMAIN

21 REESE RICHMAN LLP

Attorneys for Plaintiff

22 BY: MICHAEL R. REESE

23 BINGHAM McCUTCHEN LLP (NYC)

Attorneys for Defendant RCN Corporation

24 BY: PETER C. NEGER

25 ANDREW GROSSO & ASSOCIATES

Attorneys for Paxfire, Inc.

BY: ANDREW GROSSO

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1 THE CLERK: Feist v. RCN.

2 All parties please state who they are for the record.

3 MR. SEIDMAN: Peter Seidman, with Milberg LLP, for
4 Betsy Feist.

5 THE COURT: I'm sorry.

6 MR. SEIDMAN: Peter Seidman, S-e-i-d-m-a-n, with
7 Milberg LLP, for Ms. Feist.

8 THE COURT: Thank you.

9 MS. CLARK: Melissa Ryan Clark, with Milberg, also for
10 Ms. Feist.

11 MR. BOBKIN: Good morning, your Honor. Adam Bobkin,
12 Milberg, for the plaintiff, Ms. Feist.

13 MR. REESE: Michael Reese, Reese Richman LLP, on
14 behalf of plaintiff, Ms. Feist.

15 MR. GROSSO: For Paxfire, Andrew Grosso, of Andrew
16 Grosso & Associates.

17 MR. NEGER: And for RCN Telecom Services LLC, Peter
18 Neger, with Bingham McCutchen, your Honor.

19 THE COURT: An interested observer.

20 MR. NEGER: Indeed.

21 THE COURT: OK. I received a letter from Mr. Grosso,
22 dated September 14, 2012, pointing out that there were -- in
23 addition to the motion to dismiss the counterclaims, there were
24 two other motions that were pending. One was a motion for
25 leave to file a surreply. I will grant that motion.

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1 Second, there was a motion for leave to amend the
2 third affirmative defense and to file a second amended answer.
3 The only amendment would add Paxfire to the language of the
4 defense. And there has been no opposition to that, has there?

5 MS. CLARK: No, your Honor.

6 THE COURT: OK. So that motion is granted.

7 And the amended answer is deemed filed, and the
8 current motion directed against the counterclaims are directed
9 against the counterclaims in that most recent pleading.

10 All right. We now come to the motion to dismiss the
11 counterclaims.

12 Now, I see that this process has resulted in narrowing
13 the counterclaims and several of the counterclaims have been
14 withdrawn, and now I have a motion to dismiss the remaining
15 counterclaims. I am familiar with the papers. I am certainly
16 prepared to listen to argument.

17 All right. Yes? If anyone wants to argue the motion
18 to dismiss the counterclaims?

19 MS. CLARK: Good morning, your Honor. I'm Melissa
20 Clark. I am here today on behalf of the plaintiff.

21 As you know, we filed a motion to dismiss defendant
22 Paxfire's counterclaims. Our plaintiff Betsy Feist filed a
23 class action complaint against Paxfire in August of last year,
24 and that complaint alleged, in sum, that Paxfire as well as
25 defendant RCN, who was her Internet service provider, monitored

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1 and intercepted her Internet use in order to make money off of
2 her searches. In response to that complaint, Paxfire filed
3 counterclaims seeking in excess of \$80 million in damages.

4 THE COURT: Paxfire alleges that, you know, sort of
5 unusually for this kind of case, that it has been grievously
6 hurt -- grievously -- lost lots and lots of money based in part
7 on what it alleges -- and, you know, these are only allegations
8 in the complaint -- were, among other things, false, defamatory
9 comments spread by the plaintiff even prior to any statements
10 made in the complaint. But the language appears to be fairly
11 specific. The charges appear to be fairly specific and quite,
12 you know, damaging -- violation of law spread, allegedly, you
13 know, prior to the time that the lawsuit was even brought.

14 So rather than follow what, you know, some would say
15 is a reasonable way of litigation in the court, it's alleged in
16 the counterclaims that the plaintiff started a campaign prior
17 to the time that the lawsuit was brought and spread false and
18 defamatory comments that actually had a deleterious effect on
19 specific contracts that Paxfire had and on business relations
20 that Paxfire had. Whether any of that is really true we don't
21 know; this is a motion to dismiss the counterclaims.

22 But the harms are allegedly very grievous, and the
23 statements are very specific. And I realize that this is a
24 motion to dismiss. So tell me how, in view of all of that, I
25 can simply, you know, ignore it, say go home, sorry. You know,

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1 the defendant claims that they've been grievously hurt to the
2 tune of millions of millions of dollars, and the allegations
3 are fairly specific. I know you argue that some of them aren't
4 so plausible.

5 On another day you would be arguing to me that I ought
6 not to dismiss a plaintiff's complaint because the allegations
7 are, you know, sufficiently detailed and plausible and that the
8 standards to be applied should not be so rigorously applied as
9 to deny access to the courts. It would be, you know,
10 interesting if I applied those standards to these
11 counterclaims. All I do, though, is I apply the law as best I
12 read it.

13 So your motion.

14 MS. CLARK: Your Honor, we agree, of course, that the
15 counterclaims must be plausible, and there are a number of
16 pleading standards that Paxfire has simply failed to meet that
17 warrant dismissal on the law. We've previously moved to
18 dismiss this complaint. We filed an opposition to Paxfire's
19 leave to amend this complaint -- these counterclaims, rather.

20 THE COURT: And you were successful because, you know,
21 you read the counterclaims now and you see "withdrawn,"
22 "withdrawn," "withdrawn."

23 MS. CLARK: Right. We also moved for sanctions with
24 regard to the initial counterclaims, and yet there are still a
25 number of --

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1 THE COURT: And I think I denied that motion, right?

2 MS. CLARK: You did. You did. And granted --

3 THE COURT: And I did it with a little talk about not
4 multiplying the proceedings. Now I have a motion to dismiss
5 the remaining counterclaims even though they are pretty
6 specifically pleaded. Thankfully, I don't have a counter Rule
7 11 motion that says the other side threatened you that if you
8 didn't withdraw your motion to dismiss the counterclaims they
9 would bring a Rule 11 motion against the motion to dismiss the
10 counterclaims. So I just have to decide the motion to dismiss
11 the counterclaims.

12 MS. CLARK: Yes, your Honor.

13 There are two sets of statements that Paxfire alleged
14 harmed its business. The first sort of statement is made in
15 the complaint. And as we briefed in great detail, statements
16 made in a complaint are privileged. Unless the complaint is
17 done entirely in bad faith for a solely malicious purpose with
18 no personal interest or intent to prosecute the litigation,
19 statements made in a complaint are protected.

20 The second set of statements that Paxfire has
21 identified are statements that appeared in an article written
22 by the New Scientist. And I believe there are three specific
23 statements in that article that have been identified in the
24 counterclaims, two of which are a fair and accurate reporting
25 of the complaint and that, too, is protected --

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1 THE COURT: There had not yet been a complaint. There
2 was no litigation yet.

3 MS. CLARK: That is true. It was written -- I believe
4 the article was published a few hours before the complete got
5 on file.

6 THE COURT: And the statements must surely have been
7 made obviously before the litigation ever began. It was an
8 effort to trumpet in the press the allegations.

9 Go ahead.

10 MS. CLARK: Your Honor, the statements that appear in
11 the New Scientist regarding the litigation are fairly
12 straightforward. The complaint claims and the complaint
13 alleges violations of the Wiretap Act, for example, and courts
14 have held --

15 THE COURT: You know, as an allegation of violation of
16 law.

17 MS. CLARK: Sure. Sure. But statements that are
18 pertinent --

19 THE COURT: So what, right?

20 MS. CLARK: Statements that are pertinent to a
21 litigation, even if they are made prior to the litigation or in
22 the course of an investigation, are privileged. And the New
23 Scientist is not a randomly-selected media outlet that Paxfire
24 alleges Ms. Feist called to publish her allegations.

25 The New Scientist had been investigating Paxfire's

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1 alleged course of conduct for a great deal of time, had
2 reported on the Netalyzr, which is a tool that assisted in
3 discovering Paxfire's alleged conduct. I wrote about that in
4 May of 2010. And the two parties had a common interest in
5 investigating the issue.

6 THE COURT: Well, you know, that argument sort of
7 feeds into the conspiracy arguments by Paxfire, that this was
8 an effort on the part of various people, including the
9 plaintiff, to put Paxfire out of business because they didn't
10 like Paxfire's business. And you say, well, they have a common
11 interest. What was their common interest? Putting Paxfire out
12 of business because they didn't like Paxfire.

13 Even if there were a common interest, the common
14 interest is a qualified privilege, which of course can be
15 overcome by either common law malice or constitutional malice.
16 Very difficult to decide that on a motion to dismiss.

17 Was the plaintiff motivated solely by spite? Malice?
18 Ill will? Did the plaintiff know that the charges were in fact
19 not accurate, or was the plaintiff reckless in making the
20 charges? Difficult to decide on a motion to dismiss.

21 But I'm sorry, I interrupted you.

22 MS. CLARK: I don't believe that Paxfire alleges that
23 New Scientist was part of the alleged conspiracy. Paxfire
24 alleges that Ms. Feist, through her counsel, was engaged in a
25 conspiracy with the Electronic Frontier Foundation (EFF) and

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1 the International Computer Science Institute (ICSI). Those two
2 organizations are academic research organizations that Ms.
3 Feist's counsel consulted with in investigating her complaint.
4 And, clearly, investigation of one's claims before they are
5 filed is mandated by Rule 11. And if every consultation with a
6 technology expert was -- you know, put a plaintiff at risk for
7 conspiracy allegations, I think that would have significant
8 effects on the ability for a plaintiff to have his or her day
9 in court.

10 As far as the malice allegation, they do defeat
11 privileges if they are plausibly pled. But Ms. Feist, who is
12 present in the courtroom today, is an individual Internet user.
13 She is not a competitor of Paxfire. She is not a privacy
14 advocate. She found out that her Internet searches were being
15 viewed and monitored, and has a legitimate interest in not only
16 protecting her privacy but receiving compensation because
17 Paxfire and RCN themselves received compensation from her
18 private information.

19 To defeat a common interest privilege, her intention
20 has to be solely malicious. If she has any interest, even if
21 it is as a competitor, she can still assert the privilege and
22 be protected for any claims that are alleged to be defamatory.

23 So here I don't think Paxfire has come close to
24 setting forth any plausible theory as to why Ms. Feist would
25 bring such a litigation for a solely malicious intent.

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1 With regard to common interest privilege, in addition
2 to having a common interest with the New Scientist, as they
3 were both investigating a privacy concern, Konikoff v.
4 Prudential, which came out of this court in 1999, addressed
5 communications with the media regarding litigation, and stated
6 that, generally, the media is not the entity that the
7 information is being disseminated to, it is the entity the
8 information is being disseminated through. That wasn't so much
9 the case here. Ms. Feist's counsel spoke with the New
10 Scientist in the course of investigation of a complaint. But
11 Ms. Feist also has a common interest with thousands of absent
12 class members.

13 She is a putative representative of a class of
14 thousands of Internet users across multiple Internet service
15 providers, and Konikoff v. Prudential says that where a speaker
16 has an interest in informing a widely dispersed audience of
17 certain facts, it may do so even through the media and is
18 protected from the kinds of allegations that Paxfire is making.

19 In addition, there is a third statement that appears
20 in Paxfire's allegations as a defamatory statement that it
21 alleges Ms. Feist made, but if you actually look at the article
22 its preface was "Researchers believe" and expressly attributes
23 that statement to someone other than Ms. Feist.

24 I think it is also important to note the overarching
25 failure to allege that Ms. Feist herself did anything wrong.

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1 She moved into this complaint kind of ambiguously by and
2 through her counsel through communications with EFF and ICSI,
3 but she is not alleged to have personally made any statements,
4 authorized any statements, spoken to EFF, ICSI, or the New
5 Scientist.

6 I think it becomes quite clear that this is a
7 retaliatory action based on the fact that a complaint was filed
8 against Paxfire.

9 I think the same applies with regard to the tortious
10 interference allegations which themselves have a prima facie
11 requirement that you plead malice, wrongful means. That has
12 not been appropriately pled.

13 And there is also the Noerr-Pennington doctrine which
14 protects the First Amendment right to petition the government
15 to redress your claims, and in this instance Ms. Feist had a
16 legitimate privacy interest. That petition to the government
17 can be in the form of a publicity campaign or the filing of a
18 complaint, and so she has done so.

19 But even beyond the, you know, perhaps more ambiguous
20 elements of malice and intent, there are simple pleading
21 failures. For the defamation claims, C.P.L.R. 3016 requires
22 that the particular words be specified in the complaint
23 verbatim. Paxfire has seen numerous briefings by plaintiff
24 citing this argument and yet has failed to actually quote or
25 specify or even cite paragraphs in the complaint where any of

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1 this defamatory language appears. That is a failure as a
2 matter of law to plead a defamation claim. Paxfire was unable
3 to plead who the statements were made to, the exact timing of
4 the statements, who exactly made the statements.

5 So there are bigger-picture pleading deficiencies in
6 Paxfire's claims that warrant dismissal.

7 Another issue that Paxfire must establish, that
8 Ms. Feist knew that her statements were false or were
9 negligent, was negligent in failing to investigate her claims.
10 And one of Paxfire's own allegations is that she purportedly
11 conspired with EFF and ICSI. She consulted with these major
12 research organizations about the accuracy and background of her
13 complaint and --

14 THE COURT: Do you think that the standard is properly
15 negligence or gross irresponsibility?

16 MS. CLARK: I think the standard for defamation can be
17 negligence as to her failure to ascertain the truth or falsity
18 of her statement.

19 THE COURT: OK. I think the standard may actually be
20 higher. I mean, I think I would be prepared to say that it's
21 gross irresponsibility under Chapadeau, but I am not sure I
22 have to reach that.

23 MS. CLARK: I agree. Under any standard, she went
24 above and beyond to investigate her claims.

25 In addition, reasonable reliance on an investigation

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1 defeats any inference that she acted with malice or wrongful
2 means in filing her complaint.

3 There are also other privileges that we've identified
4 in the briefing such as the self-interest privilege, and there
5 is a reasonable belief that the information is of sufficiently
6 important interest to the publisher and that the recipient's
7 knowledge of that information will be of service in the
8 protection of her interests. So to the extent the Court is not
9 persuaded by these other very strong privileges, certainly
10 Ms. Feist is reasonable in believing that speaking to the New
11 Scientist who is investigating Paxfire's conduct could assist
12 her in protecting her own privacy rights.

13 There is also a privilege that protects statements
14 made that are a legitimate public concern where if privacy --
15 where -- excuse me. If Feist acted in a grossly irresponsible
16 manner here in failing to rely on a thorough investigation,
17 then perhaps her statements about legitimate public concerns
18 would not be protected. But privacy rights of thousands of
19 Internet users is in the news every day and is undoubtedly a
20 concern that affects almost the entire population, and such
21 statements are also protected.

22 With regard to damages, Paxfire has also failed to
23 plead some crucial elements. It pleads very generally that it
24 has business relationships and contracts. But certainly for
25 tortious interference with contracts, you have to plead the

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1 terms of those contracts, whether they were terminable at will
2 and whether the alleged tortious interference was the but for
3 cause of the contract's termination, and Paxfire has failed to
4 provide any detail about its contracts or those terms.

5 It also has tortious interference with business
6 relationships claims, but it has yet to allege that Ms. Feist
7 took any action towards those third parties to actually induce
8 them to terminate their relationship with Paxfire. And that,
9 too, is a required pleading element that none of the issues
10 that I've discussed today create issues of fact. These are
11 elements that Paxfire must have pled in its counterclaims, and
12 this is its third attempt to do so and it has still failed.

13 I think that covers some of the larger failures in the
14 counterclaims. If your Honor has any questions?

15 THE COURT: No. Thank you.

16 MS. CLARK: Thank you.

17 MR. GROSSO: Good morning, your Honor.

18 This case began with EFF in San Francisco. We've
19 alleged that it was EFF and ICSI that decided, for policy
20 reasons, to destroy Paxfire and its business model. They then
21 contacted Ms. Feist's lawyers, and Ms. Feist was eventually
22 convinced to bring this case and act as the front.

23 The statements made by the New Scientist three hours
24 before the complaint was filed and the statements made by EFF
25 on its blog after the case was filed are false, as are numerous

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1 allegations in the complaint itself.

2 The judicial privilege does not apply. It does not
3 apply to the New Scientist article because the New Scientist
4 was not reporting upon a case that had been filed. Rather, it
5 was reporting upon leaks that Ms. Feist's attorneys gave to the
6 New Scientist in order to buttress their ad terrorem pact
7 against Paxfire.

8 That New Scientist article has numerous false
9 statements, three of which are clearly specifically correctly
10 specified. One of them is that Paxfire hijacked searches of
11 millions of Internet users. Now, we've heard Ms. Clark say
12 that what the language was was that "researchers believe."
13 That is in that article but it's not the only time the term
14 "hijacking" is used.

15 Now, even though the article is not attached to the
16 complaint, it is referenced, and it has been provided to the
17 Court as Exhibit 1B in a filing in January, specifically my
18 opposition to their Rule 11 motion and my response to their
19 opposition to prevent me from filing the amended complaint, so
20 with that, and without trying to turn this into a motion for
21 summary judgment, I am going to read the first sentence of that
22 article. It says: "Searches made by millions of Internet
23 users are being hijacked." That is an express defamatory
24 statement and it is false.

25 That Paxfire violated numerous statutes, including

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1 wiretapping laws, is also in that article, and it is defamatory
2 because it says that we're violating criminal law.

3 That Paxfire violated privacy safeguards enshrined in
4 the 1968 Wiretap Act is similarly defamatory to Paxfire.

5 Therefore, we have sufficiently met the standard in
6 terms of specifying defamatory statements in the New Scientist
7 article. The New Scientist article was not reporting on a
8 lawsuit that had been filed but, rather, was being used by
9 Ms. Feist in order to further terrorize Paxfire.

10 The common interest privilege does not apply. The
11 case cited by Ms. Clark, Konikoff v. Prudential Insurance
12 Company, says that that privilege does not protect publication
13 to the whole world, which is what the New Scientist did with
14 its magazine and with its website. So there is no support
15 there for that concept.

16 The article on the website of EFF is similarly not
17 protected. And I would cite to Williams v. Williams in my
18 brief as well as Long v. -- I can never pronounce this --
19 Marubeni America Corporation, 406 F.Supp.2d 285 (S.D.N.Y),
20 where they specify that there is no protection when a lawsuit
21 is filed purposely in order to enable somebody to publicize
22 defamatory statements afterwards. That is the situation we
23 have here. The lawsuit was a vehicle so that EFF and ICSI
24 could take down Paxfire.

25 Similarly, the complaint itself is not protected, and

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1 that is because the judicial privilege was waived by the
2 leaking to the press before the lawsuit was filed. And we
3 relied upon Cantu v. Flanigan, cited in our brief.

4 I turn my attention to the Noerr-Pennington Doctrine.

5 The case that Ms. Feist brought is not plausible. She
6 had a privacy agreement with RCN, that really should be
7 specified as a non-- or anti-privacy agreement, that permitted
8 RCN to do everything that she is now alleging RCN and Paxfire
9 did. And Paxfire was RCN's contractor and, therefore, its
10 actions fall under the same provisions. As a result of that,
11 she could not have a plausible belief that her lawsuit would
12 succeed.

13 Further, we take a look at the Netalyzr. Now, the
14 Netalyzr, which is this software package, initially figured to
15 be prominent before the trier of fact, but I'm not sure that is
16 going to happen anymore. Out in the West Coast I served
17 subpoenas on the three researchers who designed the Netalyzr
18 and published articles about it and upon ICSI, the
19 International Computer Science Institute, for whom they worked.
20 Ms. Feist filed motions to quash those subpoenas, citing expert
21 consulting privilege, saying they would not call those people
22 as expert witnesses and therefore the privilege prohibited me
23 from interviewing -- from deposing them and obtaining documents
24 from them.

25 The Court, in large part, granted that motion. I had

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1 not appealed that portion of the motion. But what it does is
2 if those witnesses are unavailable to me because of the actions
3 of Ms. Feist, they cannot introduce any evidence about the
4 Netalyzr into the fact proceedings of this case.

5 So we're left with a situation where Ms. Feist says
6 that, gee, I looked at the Netalyzr and it showed me that they
7 were doing all of these terrible things, but the Netalyzr
8 cannot do that. Those are her allegations in the complaint,
9 and we will support that.

10 In other words, using the Netalyzr, Ms. Feist could
11 not possibly have come up with the conclusions that she put
12 into her complaint. She lied. Now, whether she lied
13 personally or upon the reliance of her lawyers is not relevant,
14 although, again, the allegation is she personally used the
15 Netalyzr. But just assuming for the moment that there is some
16 justification that she relied on her lawyers. Her lawyers are
17 her agents, and the law in this circuit is that attorney
18 knowledge is attributable to a client because there is that
19 attorney relationship.

20 With regard to damages --

21 THE COURT: On the defamation claim, the standard of
22 responsibility in your view is what?

23 MR. GROSSO: I think that it would be more than just
24 negligence. I think --

25 THE COURT: Gross irresponsibility?

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1 MR. GROSSO: Right. And in view of the fact that she
2 used the Netalyzer and never bothered to verify that with the
3 researchers, the Netalyzer cannot do what she said it did. I
4 think we meet that.

5 With regard to damages, we have alleged that Paxfire
6 was about to be offered \$10 million or more, and as a direct
7 result of this lawsuit and the publicity around it, that offer
8 was withdrawn and the deal was quashed. As a result, Paxfire
9 is now effectively bankrupt, and we would demonstrate that. We
10 have been seriously hurt.

11 The tortious interference was directed against
12 Paxfire's clients, its own customers, ISPs, because it was by
13 publicizing this information to the world that the counterclaim
14 defendant knew that Paxfire's customers would believe it. In
15 fact, there was such a tremendous uproar that among the ten
16 companies mentioned by Ms. Feist in her complaint as being
17 customers of Paxfire, that is ISPs using Paxfire's services,
18 four of them have so far left Paxfire entirely: RCN
19 Corporation, which is named in count one, for tortious
20 interference. Since the time that complaint was filed, Wide
21 Open West used, also known as PC Direct, and Insight also
22 terminated their contracts with Paxfire because of this
23 lawsuit. Others have also left Paxfire but those were not
24 mentioned in --

25 THE COURT: I thought in your papers you agreed that

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1 you could only maintain the tortious interference with contract
2 based on your prior contract with RCN.

3 MR. GROSSO: That was at that time because that was
4 the only one of the ten named that had terminated the agreement
5 with Paxfire. The other -- I will back up.

6 Two tortious interference counts. Count one is
7 termination of contract.

8 THE COURT: Right.

9 MR. GROSSO: At the time the complaint was filed, only
10 one company terminated its contract. That was RCN.

11 Also a number of other companies mentioned in count
12 two had cut back, curtailed their business with Paxfire. So
13 that's tortious interference with prospective business
14 advantage.

15 THE COURT: And tortious interference with business,
16 you relied on XO, RCN, Wide Open West and Direct?

17 MR. GROSSO: Right. And I think -- yes. But since
18 that time Wide Open West used Insight to join RCN in
19 terminating the --

20 THE COURT: I don't think I can amend your
21 counterclaim at this point.

22 MR. GROSSO: I understand, but we do have them named
23 in count two so we'll get something for them.

24 But the damage is significant. We are losing our
25 customers. We are going out of business, and we lost a \$10

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1 million client deal.

2 With regard to Ms. Clark's complaint that I have not
3 specified in the complaint that the RCN contract was not
4 terminable at will, the contract is obviously an integral part
5 of the complaint. And, again, one can reference contracts if
6 they are an integral part of the complaint and if they had been
7 provided -- the contract has been provided to the other
8 parties. This has been provided to the plaintiff. Obviously,
9 RCN has a copy of it.

10 And I am willing to give one to the Court. It is not
11 terminable at will, and we can satisfy that requirement.

12 THE COURT: It is your representation in your papers?

13 MR. GROSSO: Yes.

14 In summary, the privileges -- there is one more thing.

15 In addition to it being implausible for the reasons
16 I've said, there is a case in this circuit, Paul v. Earthlink,
17 which holds that if an Internet service provider transfers
18 electronic signals to a device in its ordinary course of
19 business, that that is not an interception. And, indeed, all
20 of the signals that Ms. Feist complains about were transferred
21 to devices of Paxfire in RCN's ordinary course of business.

22 So coupled between the privacy agreement, the law of
23 this circuit and Ms. Feist's misuse of the Netalyzer, there is
24 no way she could have legitimately believed that her case had a
25 basis. And it was brought for another purpose, it was brought

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1 for the purpose of knocking out Paxfire.

2 THE COURT: All right. Thank you.

3 All right. I am prepared to decide.

4 The defendant, Paxfire, Inc., brought counterclaims
5 against the plaintiff, Betsy Feist, alleging libel, slander,
6 tortious interference with contracts, tortious interference
7 with business relationships, and civil conspiracy. The
8 plaintiff has filed a motion to dismiss Paxfire's counterclaims
9 pursuant to Rule 12(b)(6) of the Federal Rules of Civil
10 Procedure.

11 On a motion to dismiss a counterclaim pursuant to
12 Federal Rule of Civil Procedure 12(b)(6), the allegations in
13 the counterclaim are accepted as true. See Grandon v. Merrill
14 Lynch & Co., Inc., 147 F.3d 184, 188 (2d Cir. 1998). In
15 deciding a motion to dismiss, all reasonable inferences must be
16 drawn in the counter plaintiff's favor. See Gant v.
17 Wallingford Board of Education, 69 F.3d 669, 673 (2d Cir.
18 1995); Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989). The
19 Court's function on a motion to dismiss is "not to weigh the
20 evidence that might be presented at a trial but merely to
21 determine whether the [counterclaim] itself is legally
22 sufficient." See Goldman v. Belden, 754 F.2d 1059, 1067 (2d
23 Cir. 1985).

24 The Court should not dismiss counterclaim if the
25 counter-plaintiff has stated "enough facts to state a claim to

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Decision

1 relief that it is plausible on its face." See Twombly v. Bell
2 Atlantic Corp., 550 U.S. 544, 570 (2007). "A claim has facial
3 plausibility when the counter-plaintiff pleads factual content
4 that allows the Court to draw the reasonable inference that the
5 counter-defendant is liable for the misconduct alleged." See
6 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In deciding the
7 counter-defendant's motion to dismiss, the Court may consider
8 documents attached to the counterclaim or incorporated in it by
9 reference, matters of which judicial notice may be taken, or
10 documents that the counter-plaintiff relied upon in bringing
11 suit and either are in her possession or of which she had
12 knowledge. See Chambers v. Time Warner, Inc., 282 F.3d 147,
13 153 (2d Cir. 2002); see also Jofen v. Epoch Biosciences, Inc.,
14 No. 01 Civ. 4129, 2002 WL 1461351, at *1 (S.D.N.Y. July 8,
15 2002). While the Court should construe the factual allegations
16 in the light most favorable to the counter-plaintiff, "the
17 tenet that a court must accept as true all of the allegations
18 contained in a counterclaim is inapplicable to legal
19 conclusions." See Iqbal, 556 U.S. at 678; see also Port Dock &
20 Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir.
21 2007); Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236,
22 240 (2d Cir. 2002).

23 The following factual allegations set forth in the
24 Amended Counterclaims are accepted as true for the purposes of
25 this motion to dismiss unless otherwise noted.

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1 Paxfire is a Delaware corporation with its principal
2 place of business in Virginia. Paxfire's primary business
3 involves the sale of technology services to Internet service
4 providers ("ISPs"). This business consists of providing error
5 traffic services and direct navigation services. Both of these
6 services direct ISP end-users or customers to Web pages. Error
7 traffic services direct end-users to a page suggesting sites
8 and URL links that the end-user might choose to visit after an
9 end-user enters an error into the address bar. Direct
10 navigation services direct ISP end-users to a trademark
11 holder's page after the end-user enters the trademark into the
12 address bar or Web browser.

13 The Electronic Frontier Foundation ("EFF") and the
14 International Computer Science Institute ("ICSI") disapproved of
15 Paxfire's business practices of providing error traffic and
16 direct navigation services to ISPs and their end-users. EFF
17 and ICSI believed these services violated end-users' privacy
18 and should be elective. Paxfire alleges that this common
19 disapproval formed the basis of an agreement between ICSI and
20 EFF to act as "self-appointed enforcement officials policing
21 the Internet to deter conduct to which they objected."

22 Sometime prior to August 1, 2011, Betsy Feist, the
23 plaintiff, agreed to join EFF and ICI allegedly in
24 accomplishing their goal of discouraging Paxfire's business
25 practices. Paxfire alleges that Feist acted as the "legal

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1 front," serving "as the necessary third-party plaintiff for the
2 purposes of bringing the class action lawsuit to accomplish the
3 agreement's goals." (Amended Counterclaim Paragraph 44.)

4 Sometime between August 1, 2011 and August 4, 2011,
5 Feist communicated with Jim Giles of The New Scientist, a media
6 outlet on the Internet. Paxfire alleges that in addition to
7 informing Giles that she was filing a class action complaint,
8 Feist also made "numerous false and defamatory statements about
9 Paxfire." (Amended Counterclaim Paragraph 49.) Specifically,
10 Paxfire alleges that Feist stated (1) "Paxfire 'hijacked'
11 searches of millions of Internet users"; (2) "Paxfire violated
12 numerous statutes, including wiretapping laws"; and (3)
13 "Paxfire violated 'privacy safeguards enshrined' in the 1968
14 Wiretap Act." (Amended Counterclaim Paragraph 49(d).) In
15 addition, Paxfire alleges that Feist made these statements "for
16 the purpose of causing an article with these statements to be
17 published." (Amended Counterclaim Paragraph 49.)

18 On August 4, 2011, Feist filed a class action
19 complaint against Paxfire and RCN Corp. ("RCN"). Paxfire
20 contends that the complaint contains additional defamatory
21 statements. Paxfire further contends that at the time Feist
22 filed her Class Action Complaint, she "knew that she had
23 insufficient basis to make such statements" and "purposely
24 avoided making inquiry of Paxfire so as not to learn the truth
25 regarding these statements and allegations."

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1 Paxfire asserts that Feist's defamatory statements
2 damaged Paxfire's business relationships and reputation. In
3 particular, Paxfire alleges that Feist "intentionally procured,
4 directly and vicariously through her co-conspirators, a breach
5 of Paxfire's contract with RCN." (Amended Counterclaim
6 Paragraph 61.) In addition, Paxfire contends that Feist
7 intentionally procured the "reduction, suspension, and
8 termination of Paxfire's business relationships through
9 wrongful means, including misrepresentations and her civil
10 class action lawsuit." (Amended Counterclaim Paragraph 68.)
11 Paxfire specifically alleges that Feist harmed Paxfire's
12 ongoing business relationships with the following companies:
13 XO Communications, Wide Open West, Direct PC, and RCN.
14 (Amended Counterclaim Paragraph 67.)

15 On August 31, 2011 Paxfire filed initial counterclaims
16 against Feist. On February 13, 2012 Paxfire filed the present
17 amended counterclaims asserting claims against Feist for (1)
18 slander; (2) libel; (3) tortious interference with contract;
19 (4) tortious interference with business relationships; and (5)
20 civil conspiracy.

21 Feist moves to dismiss the defamation, tortious
22 interference, and civil conspiracy counterclaims pursuant to
23 Federal Rule of Civil Procedure 12(b)(6). Feist argues that
24 Paxfire's counterclaims should be dismissed because: (a)
25 Paxfire has not stated a defamation claim with the required

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1 particularity; (b) Feist is immune from defamation claims; (c)
2 Paxfire has failed to adequately allege the elements of a
3 tortious interference claim; (d) Feist is protected from
4 tortious interference claims by the Noerr-Pennington doctrine;
5 and (e) Paxfire has not adequately pleaded a civil conspiracy
6 claim.

7 The elements of a defamation claim under New York law
8 are "[1] a false statement, [2] published without privilege or
9 authorization to a third party, [3] constituting fault as
10 judged by, at minimum, a negligence standard, and . . . [4]
11 either caus[ing] special harm or constitut[ing] defamation per
12 se." Dillon v. City of N.Y., 704 N.Y.S.2d 1, 5 (App. Div.
13 1999). A claim for libel has an added element, namely that [5]
14 the defamatory statement must be in writing. See Meloff v. New
15 York Life Insurance Co., 240 F.3d 138, 145, (2d Cir. 2001).

16 For a claim of defamation to meet this standard,
17 courts in this Circuit have held that a plaintiff must
18 identify: (1) the allegedly defamatory statements; (2) the
19 person who made the statements; (3) the time when the
20 statements were made; and (4) the third parties to whom the
21 statements were published. Reserve Solutions, Inc. v.
22 Vernaglia, 438 F.Supp.2d 280, 289, (S.D.N.Y. 2006). See also
23 Mobile Data Shred, Inc. v. United Bank of Switzerland, No. 99
24 Civ. 10315, 2000 WL 351516, at *6 (S.D.N.Y. April 5, 2000).
25 New York Civil Practice Law and Rules Section 3016(a) also

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1 requires that "[i]n an action for libel or slander, the
2 particular words complained of shall be set forth in the
3 complaint, but their application to the plaintiff may be stated
4 generally." N.Y. C.P.L.R. Section 3016(a) (McKinney 1991).

5 As a preliminary matter, the Court must determine the
6 level of fault applicable in this defamation action. Under New
7 York law where the content of a publication is "arguably within
8 the sphere of legitimate public concern, which is reasonably
9 related to matters warranting public exposition," the party
10 allegedly defamed by such publication may not recover unless
11 "the publisher acted in a grocery irresponsible manner without
12 due consideration for the standards of information gathering
13 and dissemination ordinarily followed by responsible parties."
14 Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571
15 (N.Y. 1975). "To act in a 'grocery irresponsible manner' under
16 Chapadeau is to act with more recklessness than the 'ordinary
17 negligence' standard of care." Med-Sales Associates, Inc. v.
18 Lebhar-Friedman, Inc., 663 F.Supp. 908, 912 (S.D.N.Y. 1987).

19 Although the plaintiff is not a media defendant and
20 did not personally publish any article, the Chapadeau gross
21 irresponsibility standard has been held to apply to a private
22 plaintiff speaking on matters of public concern. See Konikoff
23 v. Prudential Insurance Co. of America, 234 F.3d 92, 102 (2d
24 Cir. 2000).

25 Here, Feist's statements are arguably within the

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1 sphere of public concern. The statements Feist made to Giles
2 allege that Paxfire was breaking the law by violating the
3 privacy of millions of Internet users. Feist then filed a
4 class action lawsuit seeking to curb this activity. The public
5 welfare is benefited from the exposure of illegal activity.
6 See Pollnow v. Poughkeepsie Newspapers, Inc., 486 N.Y.S.2d 11,
7 16 (App. Div. 1985). ('it is [] plain that a private person's
8 alleged criminal conduct and the operation of the criminal
9 justice system with respect to the disposition of the charges
10 against such an individual are matters of legitimate public
11 concern.") Paxfire agrees that gross irresponsibility is the
12 proper standard of fault to be applied. Accordingly, Feist's
13 statements will be analyzed under the Chapadeau standard.

14 Feist argues that Paxfire has not adequately alleged
15 that she was grossly irresponsible in making the defamatory
16 statements. But Paxfire has alleged that Feist made "numerous
17 false and defamatory statements about Paxfire" to Jim Giles of
18 The New Scientist. Moreover, Paxfire has alleged that Feist
19 "did not have evidence as to the truth or falsity of [the]
20 statements," See Amended Counterclaim Paragraph 51, and
21 "purposely avoided . . . learn[ing] the truth regarding these
22 statements and allegations." See Amended Counterclaim
23 Paragraph 52. If true, Feist's actions could constitute gross
24 irresponsibility. See Sepenuk v. Marshall, No. 98 Civ. 1569,
25 2000 WL 1808977 at *3 (S.D.N.Y. Dec. 8, 2000) ('[plaintiff] has

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1 put forth evidence which could support a finding that the
2 [defendant's] statements . . . were knowingly false, thus
3 evincing gross irresponsibility"); see also Lewis v. Newsday,
4 Inc., 668 N.Y.S.2d 377, 379 (App. Div. 1998) (finding that
5 newspaper's publication of statements from sources who were
6 "mere conduits for unverified rumor" raised a triable issue of
7 fact as to whether the newspaper was "grossly irresponsible"
8 where it made no effort to substantiate statements and sources
9 and made no representation that they had done so). Feist
10 contends that she cannot be found grossly irresponsible because
11 she reasonably relied on EFF and ICSI when she made her
12 statements. However, whether Feist's reliance was reasonable
13 is a question of fact best left for the jury. See Kerman v.
14 City of New York, 374 F.3d 93, 116 (2d Cir. 2004) ("questions
15 as to whether there was gross negligence, intent, or reckless
16 disregard are questions of fact to be answered by the jury.").
17 Accordingly, Paxfire has adequately alleged that Feist was
18 grossly irresponsible when she made the defamatory remarks to
19 Giles with the intent that they be published.

20 Feist next argues that Paxfire has failed to set forth
21 the particular defamatory words complained of or established
22 their falsity. In order to survive a motion to dismiss "a
23 plaintiff must plead a claim for defamation with adequate
24 specificity to afford defendant sufficient notice of the
25 communications complained of to enable her to defend herself."

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1 See Tasso v. Platinum Guild International, No. 94 Civ. 8288,
2 1997 WL 16066, at *2 (S.D.N.Y. January 16, 1997.) Paxfire has
3 met this standard by alleging three specific defamatory
4 statements that are allegedly attributable to Feist, and which
5 are the subject of the defamation claim. See Amended
6 counterclaim Paragraph 49. Paxfire has also alleged that Feist
7 reported the defamatory statements to Jim Giles at a specific
8 time, namely, "during the period of August 1 to noon on
9 August 4, 2011." See Amended Counterclaim Paragraph 49. This
10 is sufficient to put Feist on notice of the communications
11 complained of and enable her to defend herself.

12 Although Feist argues that Paxfire has failed to
13 establish the falsity of the defamatory statements, on a motion
14 to dismiss "the Court accepts plaintiff's allegations as true,
15 it assumes that defendants' statements are false and that
16 defendants were culpable in making the statements." Henneberry
17 v. Sumitomo Corp. of America, No. 04 Civ. 2128, 2005 WL 991772,
18 at *16 (S.D.N.Y. April 27, 2005); see also Lucking v. Maier,
19 No. 03 Civ. 1401, 2003 WL 23018787, at *3 n. 4 (S.D.N.Y.
20 December 23, 2003). Paxfire has alleged that Feist's
21 statements were false. Accordingly, Paxfire's allegations of
22 falsity are sufficient to survive a motion to dismiss. See
23 Daniels v. Provident Life & Casualty Insurance Co., No. 02 Civ.
24 0668E, 2002 WL 31887800, at *5, (W.D.N.Y. December 22, 2002).
25 See also Tuff-N-Rumble Management, Inc. v. Sugarhill Music

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1 Publishing, Inc., 8 F.Supp.2d 357, 362 (S.D.N.Y. 1998).

2 ("[defendant's] claim that its statements are true raises a
3 factual issue that does not weaken the sufficiency of the
4 pleading").

5 Paxfire also alleges special damages. See Amended
6 Complaint Paragraph 82. In addition, Paxfire alleges that
7 Feist made statements that compromised the integrity of
8 Paxfire's business when she accused Paxfire of illegal conduct.
9 Such allegations support a claim of defamation per se. See
10 Ruder & Finn, Inc. v. Seaboard Surety Co, 422 N.E.2d 518, 522
11 (N.Y. 1981). See also Treppel v. Biovail Corp., No. 03 Civ.
12 3002, 2004 WL 2339759, at *17 (S.D.N.Y. October 15, 2004).

13 These allegations are sufficient to put Feist on
14 notice of the claims against her. Accordingly, Feist's motion
15 to dismiss Paxfire's defamation counterclaim on this basis is
16 denied.

17 Feist alternatively argues that her statements were
18 not defamatory because they are protected by the absolute and
19 common interest privileges.

20 "Statements uttered in the course of a judicial or
21 quasi-judicial proceeding are absolutely privileged so long as
22 they are material and pertinent to the questions involved."

23 Bernstein v. Seeman, 593 F.Supp.2d 630, 636 (S.D.N.Y. 2009).

24 "Proceedings are quasi-judicial if: (1) a hearing is held; (2)
25 both parties may participate; (3) the presiding officer may

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1 subpoena witnesses; and (4) the body has the power to take
2 remedial action." Boice v. Unisys Corp., 50 F.3d 1145, 1150
3 (2d Cir. 1995).

4 Here, any statements in Feist's complaint are
5 protected by the absolute privilege because judicial action is
6 commenced by filing a complaint with the court. However, the
7 absolute privilege does not extend to any statements Feist or
8 her attorneys made to Jim Giles before the lawsuit was filed
9 because Giles was not involved in the lawsuit. See Long v.
10 Marubeni Am. Corp., 406 F.Supp.2d 285, 294 (S.D.N.Y. 2005).
11 ("The privilege is usually understood as not applying . . . to
12 out-of-court statements made to persons not related to the
13 litigation."); see also Schulman v. Anderson Russell Kill &
14 Olick, PC, 458 N.Y.S.2d 448, 453-54 (Sup. Ct. 1982) ("the
15 absolute privilege protecting statements in the course of
16 judicial proceedings does not apply to lawyers' informal
17 communications designed to gather information or to identify
18 potential witnesses"). Furthermore, there is no argument that
19 the statements Feist made to Giles were uttered in the course
20 of a judicial or quasi-judicial proceeding. Accordingly, the
21 statements Feist made to Giles are not absolutely privileged.

22 Likewise, the common interest privilege does not
23 protect Feist's statements to Giles. "[D]efamatory
24 communications made by one person to another upon a subject in
25 which both have an interest are protected by the common

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1 interest privilege, which is a defense to defamation. Meloff,
2 240 F.3d at 145 (citing Konikoff, 234 F.3d at 98 (2d Cir.
3 2000)). A plaintiff may overcome the privilege by proving that
4 the statement was not substantially true and that the defendant
5 abused the privilege. See id. at 146. A defendant abuses the
6 privilege if the defendant acted beyond the scope of the
7 privilege, acted with common law malice, or acted "with
8 knowledge that the statement was false or with a reckless
9 disregard as to its truth." Id. (Citing Weldy v. Piedmont
10 Airlines, Inc., 985 F.2d 57, 62 (2d Cir. 1993)).

11 Here, Feist alleges that her communications with Giles
12 are protected by the qualified privilege because she has a
13 common interest with Jim Giles. However, Paxfire contends that
14 Feist abused her common interest privilege because she acted
15 with malice. See Amended Complaint Paragraph 81. Thus,
16 whether the common interest privilege protects Feist's
17 communications is a question of fact that cannot be decided at
18 this stage of the litigation. See Boyd v. Nationwide Mut. Ins.
19 Co., 208 F.3d 406, 410 (2d Cir. 2000) ("[Plaintiff]'s claim
20 raises doubts about the defendant's good faith, which is the
21 linchpin of any qualified privilege . . . [that] permits a
22 sufficient inference that Nationwide abused its qualified
23 privilege."); see also Stern v. Leucadia Nat.'l Corp., 844 F.2d
24 997, 1004 (2d Cir. 1988). Thus, it cannot be determined on a
25 motion to dismiss that Feist's statements to Giles are

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1 privileged and Paxfire has adequately pleaded its defamation
2 claim. Accordingly, Feist's motion to dismiss Paxfire's
3 defamation counterclaim is denied with respect to any
4 statements Feist made to Giles before she filed her lawsuit.

5 Feist next argues that Paxfire has failed to
6 adequately plead a claim for tortious interference.

7 In particular, Feist contends that Paxfire has not
8 adequately allege the existence of valid contracts with the
9 ISPs. Under New York law, the elements of a tortious
10 interference with contract claim are (1) the existence of a
11 valid contract between the plaintiff and a third party; (2) the
12 defendant's knowledge of the contract; (3) the defendant's
13 intentional procurement of the third party's breach of the
14 contract without justification; (4) actual breach of the
15 contract; and (5) damages resulting therefrom. Kirch v.
16 Liberty Media Corp., 449 F.3d 388, 401-02 (2d Cir. 2006).
17 Paxfire has alleged that it had valid contracts with eleven
18 ISPs. See Amended Complaint Paragraph 59. Paxfire has also
19 alleged that Feist had actual knowledge of these contracts.
20 See Amended Counterclaim Paragraph 60. This allegation is
21 supported by the fact that Feist identified that Paxfire had
22 business relationships with all the relevant ISPs, except XO
23 Communications, in her own complaint. Further, Paxfire alleges
24 that it suffered damages as a result of Feist's actions. See
25 Amended Counterclaim Paragraph 63 and 82. Although Feist

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1 argues that Paxfire has failed to plead that its contracts were
2 not terminable at will, this does not warrant dismissal unless
3 it is clear that such contracts were in fact terminable at
4 will. See AIM Int'l Trading, L.L.C. v. Valcucine S.p.A., No.
5 02 Civ. 1363, 2003 WL 21203503, at *5 (S.D.N.Y. 2003). Thus,
6 because it is not clear from the Amended Counterclaim that
7 Paxfire's contracts are terminable at will, this does not
8 provide a basis for dismissal. Indeed, Paxfire has proffered
9 that its contracts with the ISPs were not terminable at will.
10 See Plaintiff's Memo of Law at 13.

11 However, of the eleven ISPs cited, Paxfire has only
12 alleged actual contract breaches with RCN and XO
13 Communications. See Amended Counterclaims Paragraphs 61 and
14 82. Further, Paxfire only alleges that Feist intentionally
15 procured an unjustified breach of Paxfire's contract with RCN.
16 See Amended Counterclaim Paragraph 61. Indeed, Paxfire
17 concedes this point. Accordingly, Paxfire may only maintain a
18 claim for tortious interference with contract based on its
19 previous contract with RCN. See RSM Production Corp. v.
20 Fridman, 643 F.Supp.2d 382, 405 (S.D.N.Y. 2009).

21 Although Paxfire may not maintain a claim for tortious
22 interference with contract with the other ISPs, it may sustain
23 its claim for tortious interference with business relationships
24 with the ISPs. To state a claim for tortious interference with
25 a business relationship a plaintiff must allege that "(1) the

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1 plaintiff had a business relation with a third party; (2) the
2 defendant interfered with those business relations; (3) the
3 defendant acted for a wrongful purpose or used dishonest,
4 unfair, or improper means; and (4) the defendant's acts injured
5 the relationship." Catskill Development, L.L.C. v. Park Place
6 Entertainment Corp., 547 F.3d 115, 132 (2d Cir. 2008).

7 Feist argues that Paxfire has inadequately pleaded
8 that it had business relationships, but Paxfire has alleged
9 prior business relationships with ten ISPs. See Amended
10 Complaint Paragraph 65. Paxfire also alleges that Feist
11 interfered with its ongoing business relationships with these
12 ISPs. See Amended Counterclaim Paragraph 67. Further, Paxfire
13 alleges that Feist used wrongful means to interfere with these
14 business relationships. See Amended Counterclaim Paragraph 68.
15 Feist argues that this is insufficient because Paxfire has
16 failed to allege that Feist acted solely by wrongful means.
17 However, the wrongfulness of Feist's actions cannot be
18 determined at the motion to dismiss stage of the litigation.
19 See, for example, Cerveceria Modelo S.A. De C.V. v. USPA
20 Accessories LLC, No. 07 Civ. 7998, 2008 WL 1710910, at *5
21 (s.D.N.Y. April 10, 2008); see also Mina Inv. Holdings Ltd. v.
22 Lefkowitz, 184 F.R.D. 245, 251 (S.D.N.Y. 1999).

23 However, at this point Paxfire has only alleged actual
24 injuries to its business relationships with XO Communications,
25 RCN Corporation, Wide Open West and Direct PC. See Amended

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1 Counterclaim Paragraph 67. Paxfire also alleges that Feist was
2 aware of its business relationship with each of these entities.
3 See Amended Counterclaim Paragraph 66. Therefore, Paxfire's
4 Counterclaim alleging tortious interference with its business
5 relations with each of these four ISPs cannot be dismissed on
6 this motion to dismiss.

7 Feist argues that even if Paxfire has adequately
8 pleaded a tortious interference claim, she is protected by the
9 Noerr-Pennington Doctrine. This Doctrine, which derives from a
10 trilogy of antitrust cases decided by the Supreme Court and is
11 based on First Amendment principles guaranteeing the right to
12 petition the government, immunizes from antitrust scrutiny
13 "mere attempts to influence the passage or enforcement of
14 laws," Eastern Railroad Presidents Conference v. Noerr Motor
15 Freight, Inc., 365 U.S. 127, 135 (1961), regardless of any
16 anticompetitive motives behind these attempts, as well as
17 good-faith attempts to secure legitimate goals through
18 administrative agencies and courts. See California Motor
19 Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11
20 (1972). The doctrine has also been extended to areas outside
21 of the antitrust arena, and has specifically been held to
22 protect the exercise a defendant's First Amendment rights even
23 when such action would normally constitute tortious
24 interference. See NAACP v. Claiborne Hardware Co., 458 U.S.
25 886, 911-12 (1982). The doctrine, however, does not shield a

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1 defendant from liability for instituting "sham" litigation.

2 See Noerr, 365 U.S. at 144; see also Professional Real Estate
3 Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49,
4 60-61 (1993).

5 Here, Paxfire alleges that Feist committed tortious
6 interference before filing her lawsuit by making false
7 statements to private third parties. These actions would not
8 be protected by the Noerr-Pennington Doctrine because they were
9 not directed at any federal agency. Moreover, these acts were
10 not in any way incident to her litigation. Thus, the Doctrine
11 would not shield Feist from liability for any alleged tortious
12 interference that occurred prior to filing her lawsuit.

13 Paxfire also argues that Feist's litigation is a sham
14 and therefore that the Noerr-Pennington Doctrine is not
15 applicable to her lawsuit. However, whether Feist's lawsuit is
16 a sham is a factual issue that cannot be decided at the
17 motion-to-dismiss stage of litigation. See Riddell Sports,
18 Inc. v. Brooks, No. 92 Civ. 7851, 1997 WL 148818, at *5
19 (S.D.N.Y. March 27, 1997. ("Whether litigation is a sham is a
20 fact-intensive inquiry that cannot be decided on a motion for
21 summary judgment."); see also N.Y. Jets LLC v. Cablevision
22 Systems Corp., No. 05 Civ. 2875, 2005 WL 3454652 at *2
23 (S.D.N.Y. December 19, 2005) ("where . . . facts are in
24 dispute, there is no requirement that a court determine whether
25 the sham exception applies without the benefit of full

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1 discovery.") (Internal quotation marks omitted.)

2 Finally, Feist moves to dismiss Paxfire's civil
3 conspiracy claim. The elements of a civil conspiracy claim are
4 "(i) an agreement between two or more persons, (ii) an overt
5 act, (iii) an intentional participation in the furtherance of a
6 plan or purpose, and (iv) resulting damages." Official
7 Committee of Unsecured Creditors v. Donaldson, Lufkin &
8 Jenrette Securities Corp., No. 00 Civ. 8688, 2002 WL 362794 at
9 *13 (S.D.N.Y. March 6, 2002.) In addition, New York does not
10 recognize a substantive tort of civil conspiracy. See, e.g.,
11 Antonios A. Alevizopoulos & Associates v. Comcast International
12 Holdings, Inc., 100 F.Supp.2d 178, 187 (S.D.N.Y. 2000). In
13 order to state a claim for civil conspiracy, therefore, there
14 must be an allegation of an independent intentional tort. See
15 Agron v. Douglas W. Dunham, Esq. & Assocs., No. 02 Civ. 10071,
16 2004 WL 691682, at *6 (S.D.N.Y. March 31, 2004); see also
17 Alevizopoulos & Associates, 100 F.Supp.2d at 187-88.

18 In the present case, Paxfire alleges that Feist
19 entered into an agreement with EFF and ICSI to disrupt
20 Paxfire's business. See Amended Counterclaim Paragraph 44.
21 Paxfire alleges that this agreement was furthered, in part, by
22 an e-mail circulated between the alleged conspirators. In
23 addition, Paxfire asserts that Feist intentionally participated
24 in this plan by making statements to Jim Giles, and that these
25 statements damaged Paxfire. Paxfire has also alleged that

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1 there are underlying intentional torts which were the object of
2 the civil conspiracy. Thus, Paxfire has alleged enough facts
3 to adequately plead a civil conspiracy claim. Accordingly,
4 because the civil conspiracy claim hinges on the aforementioned
5 tort claims, the same issues which preclude dismissal of those
6 claims prevent dismissal of the civil conspiracy claim. See
7 Omni Consulting Group, Inc. v. Marina Consulting, Inc., No. 01
8 Civ. 511A, 20007 WL 2693813, at *8 (W.D.N.Y. September 12,
9 2007).

10 The Court has carefully considered all of the
11 arguments of the parties. To the extent not specifically
12 addressed above, remaining arguments are either moot or without
13 merit. For the foregoing reasons, the plaintiff's motion to
14 dismiss the Amended Counterclaims is denied in part and granted
15 in part.

16 The Clerk is directed to close Docket No. 747.

17 So ordered.

18 All right. There is a scheduling order and the case
19 is proceeding apace.

20 MR. NEGER: This is Peter Neger, your Honor.

21 We had a status conference with Magistrate Judge Ellis
22 I guess it would be a week ago, and he directed the parties to
23 make some adjustments to the scheduling order. We submitted a
24 proposed revised order to him I think it was yesterday. I
25 could hand that up to your Honor if you wish, but I know it is

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1 before Magistrate Judge Ellis for his review, and I suspect
2 that he will approve it and pass it on to your Honor.

3 THE COURT: OK. Actually, I assigned it to Magistrate
4 Judge Ellis for general pretrial, right?

5 MR. NEGER: Yes.

6 THE COURT: So I assume that he can sign the revised
7 scheduling order.

8 MR. NEGER: Perfect.

9 THE COURT: What is the date for the completion of
10 discovery?

11 MR. NEGER: The fact discovery is completed, your
12 Honor --

13 THE COURT: Could you pass it up.

14 MR. NEGER: Yes. Absolutely.

15 THE COURT: It would be helpful. Thank you.

16 (Pause)

17 OK. Thank you.

18 Is this copy for me?

19 MR. NEGER: You may have it, your Honor.

20 THE COURT: All right. Anything else?

21 (Pause)

22 OK. Good morning, all.

23 MR. NEGER: Thank you, your Honor.

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